IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 22.03.2006

CORAM:

THE HON 'BLE MR. JUSTICE K.MOHAN RAM

Writ Petition No.7464, 7465 and 7472 of 2006
and W.P.M.P.No.8203, 8204 and 8210 of 2006

M/s. Vinbros & Co.,
23, Romain Rolland Street
Pondicherry - 605 001
Rep. By its Managing partner
Sri V.C.Raamsukaesh. ... Petitioner in all Writ petitions.

-Vs-

1. The Income Tax Officer
   Ward I (1)
   Pondicherry.

2. The Commissioner of Income Tax
   D.P.Thottam, M.G.Road
   Pondichery - 605 003. ... Respondents in all Writ petitions.

PRAYER : Petitions filed under Article 226 of the Constitution of India for the issuance of a Writ of Certiorari calling for the records in GIR No.4301-V/1(1)/PDY/2005-06 PAN :AAFV0610R dated 13.03.2006, relating to the assessment years 2001-02, 2003-04 and 2004-05 respectively of the 1st respondent and quash the same.

For Petitioner : Mr. V.Ramachandran, Senior Counsel for M/s. Dr.Anitha Sumanth.
For Respondents : Mrs. Pushya Seetharaman Sr. Standing Counsel for Income Tax.

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O R D E R

Mrs. Pushya Seetharaman, learned Senior Standing Counsel for Income Tax takes notice for the respondents. By consent of both parties, the writ petition itself is taken up for final disposal.

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2. The short facts for deciding the issue involved, and as set out in the affidavit, are as follows:

In respect of the year 2001-02, the petitioner filed its return of income on 30.10.2001. The return was processed and thereafter, after due enquiry, the Assessing Authority made an assessment on the petitioner on 31.03.2004, under Section 143(3) of the Income Tax Act (hereinafter referred to as 'the Act'). In the assessment order, the Assessing Authority concluded that the activity of the petitioner constituted manufacture within the meaning of Section 80IB of the Income Tax Act and, accordingly, the petitioner's claim for relief under Section 80IB was granted. According to the petitioner the tax based on the above said assessment has been duly paid by the petitioner and the proceedings have become final.

3. While so, the Commissioner of Income Tax, the second respondent herein, initiated proceedings under Section 263 of the Income Tax Act on the ground that the assessment made by the first respondent is erroneous, in so far as he had granted relief to the petitioner under Section 80IB of the Act. The second respondent revised the order of the first respondent by an order, dated 02.03.2006. By the said order, the second respondent held that the petitioner is not engaged in the manufacture and, consequently, deduction under Section 80IB has been wrongly allowed. Consequently, the second respondent directed the first respondent to re-compute the total income of the petitioner, ignoring the deduction under Section 80IB and determine the tax and interest payable on the re-computed income and raise a demand accordingly issuing a notice under Section 156 of the Income Tax Act. The order of the second respondent was served on the petitioner on 03.03.2006. Along with the said order of the second respondent, an order of the first respondent made on 02.03.2006, determining the revised total income of the petitioner and tax thereon, along with a notice of demand under Section 156 of the Income Tax Act, was also served on the petitioner. As per the contention of the petitioner, the order dated 02.03.2006 made by the first respondent constitutes a fresh assessment of the total income of the petitioner and it has been made in gross violation of the Act and the principles of natural justice under Section 156. A notice of demand is liable to be served only along with an order determining the tax, interest or other sums payable by the assessee.

4. In the notice of demand attached to the said order, the first respondent has directed the petitioner to pay the disputed demand within 30 days from the date of the service of the notice. On receipt of the same, the petitioner addressed a letter to the first respondent informing him that the said order has been made without giving the petitioner an opportunity and, accordingly requested him to withdraw the said order and make a proper order after giving an opportunity as required by law. The

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petitioner has also stated in the letter that it has not accepted the order dated 02.03.2006 made by the first and second respondents and the petitioner shall not be treated as an assessee in default. According to the petitioner, the said request was made in terms of Section 220 of the Income Tax Act.

5. It is the further case of the petitioner that on receipt of the aforesaid letter, the first respondent addressed a letter to the petitioner on 07.03.2006, rejecting the request made by the petitioner for not treating the petitioner an assessee in default. In the said order the first respondent directed the petitioner to pay the demand in accordance with the notice of demand viz., within 30 days from the date of service. Immediately thereafter, the first respondent suo motu, addressed another letter on 13.03.2006 directing the petitioner to pay the entire demand within a period of 2 days and the said letter was served on the petitioner on 14.03.2006 in the afternoon and the petitioner was directed to pay the entire disputed demand on or before 5.00 pm on 15.03.2006 instead of the 30 days period allowed earlier. The said notice dated 13.03.2006 is impugned in W.P.No.7464 of 2006.

6. It is the further case of the petitioner that not satisfied with the above demand the first respondent also made an arbitrary assessment for the assessment year 2003-2004 in respect of which period the assessment proceedings were in progress on day-to-day basis; the petitioners Chartered Accountant was also making regular appearance; various details were called for by the first respondent and the petitioner had requested for time for production of these details. Suddenly, by letter dated 10.03.2006, the first respondent issued a letter stating that he would not grant the time asked for and made an order of assessment dated 13.03.2006; along with the aforesaid order of assessment. a notice of demand was issued under Section 156 and in the said notice of demand, the first respondent directed the petitioner to pay the entire demand within a period of 2 days.

7. The further case of the petitioner is that in respect of assessment year 2004-2005 also, the first respondent made an arbitrary assessment without affording an opportunity as required by law; along with the said assessment also, he issued a demand notice demanding the payment of the entire demand within 2 days. Letters of identical nature were issued in respect of these demands for reducing the period for payment from 30 days to 2 days.

8. The petitioner challenges the abovesaid three impugned proceedings on the ground that the proviso to Section 220(1) permits the Assessing Authority to reduce the time limit below 30 days, only if the circumstances of the case justify a reason to believe that it would be detrimental to afford 30 days to the assessee. According to the petitioner, the petitioner's clean history with the Income Tax authorities would clearly establish that there could not be a reason for such belief.

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It is the further contention of the petitioner that the impugned order does not set out any reason as to how it would be detrimental to allow the petitioner 30 days time, which is granted by the statute. According to the petitioner, the reasons stated by the first respondent in the impugned notice cannot be a reason for exercise of the discretion under Section 220 (1) of the Act.

9. The further contention of the petitioner is that the proviso to Section 220(1) is an exceptional circumstance, which can be invoked, only if the assessee is likely to alienate its asset or leave the country or act with a view to defeat the interests of the Revenue and such interests are likely to be jeopardized by any overt act that could be done by the assessee and no such allegation or even a whisper to that effect is made against the petitioner in the impugned proceedings.

10. A detailed common counter affidavit has been filed by the respondents. In paragraph No.3, it is stated as follows:

> "It is submitted that the second respondent is placing strong reliance on the decision of the Special Bench (Calcutta) of the Income Tax Appellate Tribunal in the case of Shaw Scott Distilleries P Ltd Vs. ACIT 255 ITR 14 (AT). The decision of the Special Bench is on identical issue as in the case of the assessee. This decision remains unchallenged before any Court and thus has a pervading effect. In view of the law laid down in the decision, the assessee was not eligible to claim deduction under Section 801B and the Commissioner therefore, held in his order under Section 263 that the deductions claimed by the assessee was wrongly allowed by the assessing officer. The assessee was, therefore, asked to pay the consequent demand specified in the notice under Section 156 by an order under Section 220(1) of the Income Tax Act dated 13.03.2006 in the assessee's case for the assessment year 2001-02, before 15.03.2006, the notice of demand being served on the assessee on 03.03.2006. As such this is the only decision which is available on the subject which has almost reached the finality as the decision of the special bench has not yet been challenged before the Hon'ble Court. Hence the submission of the Assessee though unnecessary in the context involved in the present Writ is misleading and misinterpreting the law on the subject. As the order of the 2nd respondent passed under Section 263 is not challenged in these Writ petitions, there is no cause of action that arises out of this order here."

In paragraph No.7, it is stated as follows:

> "It is submitted that the subject matter of the present Writ is the order dated 13.3.2006 passed under Section 220 (1) of the Income Tax Act by the first respondent and the petitioner has no right to raise any issue pertaining to

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any other order or communication of this respondent by the petitioner itself in the present proceedings. The contention are therefore to be dismissed in limine and so not maintainable at all".

In paragraph No.8, it is stated as follows:

"As regards the petitioner stating that the suo moto letter dated 13.03.2006 issued by the first respondent, it is submitted that this is not an ordinary letter but an order passed under Section 220(1) of the Income Tax Act, 1961 which the petitioner is deliberately labeling as a suo moto communication. This respondent has passed a speaking order giving the basis and justification for reducing the time for payment of dues from the petitioner specified in the notice of demand under Section 156. This respondent has given lawful and valid reasons clearly stated in his order, reduced the period from 30 days to 13 days expiring on 15.03.2006. A plain reading of the order which again the petitioner is referring differently as a notice, was a validly passed order and was not passed arbitrarily or with a view to harass the petitioner".

It is further stated in paragraph No.11 of the counter affidavit that there is no financial difficulty on the part of the petitioner at present, and also since the matter has been decided on merits by the Special Bench of the Tribunal, the petitioner cannot be said to have a prima facie case, unless the order of the Special Bench is reversed by the High Court or Supreme Court. As things stand as on this date, the issue is covered against the petitioner by the order of the Special Bench cited above. It is the further contention of the respondents that the impugned orders have been passed only in the exceptional circumstances and the first respondent has passed valid and speaking orders, after giving sufficient reasons, which formed basis for passing such orders. On the above said grounds, the respondents seek the dismissal of these writ petitions.

11. The Learned Senior Counsel appearing for the petitioner invited my attention to Section 220(1) of the Income Tax Act and its proviso. Section 220(1) of the Income Tax Act, reads as follows:-

"220 (1) Any amount, otherwise than by way of advance tax, specified as payable in a notice of demand under Section 156 shall be paid within (thirty) days of the service of the notice at the place and to the person mentioned in the notice:

Provided that, where the Assessing Officer has any reason to believe that it will be detrimental to revenue if the full period of thirty days aforesaid is allowed, he may, with the previous approval of the Joint Commissioner, direct that the sum specified in the notice of demand shall be paid within such period being a period less than the period of thirty days aforesaid, as may be specified by him in the notice of demand".

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Learned Senior counsel submitted that if the assessing officer has any reason to believe that it will be detrimental to the Revenue, if the full period of 30 days itself is allowed, he may, with the previous approval of the Joint Commissioner, direct that the sum specified in the notice of demand shall be paid within a period less than the period of 30 days. He emphasised that to reduce the time of 30 days, there should be reason to believe that it will be detrimental to Revenue, if the full period of 30 days is allowed.

12. According to the learned Senior Counsel, initially the first respondent granted 30 days time by applying his mind to the facts of the case and at that time, the first respondent had no reason to believe that it will be detrimental to give a lesser time than 30 days. But subsequently, after the petitioner sent its reply disputing its liability to pay, the impugned proceedings have been issued reducing the time of 30 days to 13 days and granting only 2 days time for paying the amounts demanded in respect of the assessment years 2003-2004 and 2004-2005. According to the learned Senior Counsel, after granting the time of 30 days, no material facts have come to the notice of the first respondent to believe that if the 30 days time is allowed to the petitioner, it will be detrimental to the interest of the Revenue and on that basis, the time granted already was revised.

13. Per contra, the Learned Standing Counsel for the Income Tax department while reiterating the contentions raised in the counter affidavit submitted that the impugned proceedings contain sufficient reasons justifying the grant of lesser time than 30 days and further contended that the first respondent has exercised his discretion under Section 220 (1) of the Act, after taking into consideration all the relevant materials and circumstances available in the case. In the back ground of the said contentions, this Court has to consider as to whether the impugned proceedings of the first respondent are strictly in accordance with the provisions contained in Section 220 (1) of the Act.

14. It will be useful to extract the relevant part of the impugned proceedings and in paragraph 2 of the impugned proceedings it is stated as follows:

> "... In view of the binding nature of decision of the Special Bench of the Tribunal, the assessee has no chance of success in challenge of the order of the Commissioner of Income Tax atleast upto the Tribunal. Therefore, the circumstances necessitate that the assessee should not be allowed full time of 30 days as provided under Section 220 (1) for making payment of the demand raised. It is therefore detrimental to revenue to allow such full time for payment".

In paragraph No.3 of the impugned proceedings, it is stated as follows:

> "Besides, any collection of demand or any other taxes etc. during the relevant financial year is only in

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furtherance to mobilisation of revenue committed to the Parliament during the Budget exercise. Every year collection of taxes etc. under the Income Tax Act is thus also part of the public policy. The circumstances of the present case also shows that it is not in consonance with the public policy to permit full period of thirty days for allowing the assessee to make payment of the demand raised".

The words "reason to believe" suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds, relevant and available materials on record. The Income Tax Officer would be acting without jurisdiction if the reason for his belief that the conditions contemplated under Section 220 (1) of the Act are satisfied does not exist or is not material or relevant to the belief required by the Section. The Court can always examine this aspect.

15. It is abundantly clear that the two reasons which have been given in the impugned proceedings for the belief which was found by the Income Tax Officer hopelessly failed to satisfy the requirements of the statute. In my considered view, eventhough the assessee may or may not have a chance of success in challenging the order of the Commissioner of Income Tax, as on today, as stated by the Income Tax Officer, the view taken by the Tribunal may at any time be changed by the higher forum and hence that may not be considered to be a relevant ground for reaching such belief. The other reason given by the Income Tax Officer namely, it is not in consonance with the public policy to permit full period of 30 days for allowing the assessee to make payment of the demand raised, can also not be considered as a relevant circumstance to reduce the period of 30 days allowable under Section 220 (1) of the Act.

16. The reasons extracted supra were already available before the first respondent while granting the 30 days time to the petitioner, but yet he did not chose to reduce 30 days time at the first instance. These reasons cannot be said to be reasons which will enable the first respondent to reduce the 30 days time granted in respect of Assessment year 2001-02 or to fix 2 days time for payment the tax demanded in respect of assessment years 2003-04 and 2004-05. The first respondent could reduce 30 days time, if there were compelling circumstances. But in this case, in my considered view, no such compelling circumstances were available and the impugned proceedings does not reveal such compelling circumstances. There is absolutely nothing in the impugned proceedings to show that by granting 30 days time, some detriment will be caused to the Revenue and even in the counter affidavit, nothing is stated which, will justify the reduction of time.

17. In grounds (k) and (d), it is stated as follows:

"(k) The 1st respondent ought to have seen that the petitioner not only files returns in time and pays taxes regularly, but even for the current year the advance tax

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has been paid regularly and the final instalment has also been paid on the due date. These facts have been totally ignored by the 1st respondent in making the aforesaid impugned order. In fact there is no arrears of tax due by the petitioner as on today or the date on which the impugned orders were made"

(d) "... that the 1st respondent was acting solely in retaliation to the submissions made by the petitioner that the order was not made in accordance with law."

But these averments have not been specifically denied in the counter affidavit filed by the respondents.

18. In paragraph 11 of the counter affidavit it is stated that 'there is no financial difficulty on the part of the petitioner at present'. In paragraph 16 of the counter affidavit it is stated that 'there is no provision under Section 220 (1) to consider the history or background of the petitioner before passing that order and the petitioners are admittedly rich enough to meet the demand at any point of time'.

In paragraph 17 of the counter affidavit it is stated as follows:

"The petitioner says that paying the demand under the reduced period which has been extended by the Hon'ble Court till the 22nd of this month would cause irreparable loss and hardship whereas it admittedly has substantial assets by way of immovable properties including two major industrial units which are worth many the times the demand in question".

In the same paragraph it is also stated that the petitioner has not made out any case as to how the interest of revenue would not suffer in terms of provisions of Sec. 220 (1) if it is allowed full time for payment.

In paragraph 3 of the affidavit, the petitioner has stated as follows:

"The petitioner has impeccable records with the Income Tax Department and has always been recognized as one of the best assesses in the Union Territory of Pondicherry, affording full cooperation to the Department in the matter of Income Tax assessment."

19. The respondents, without specifically denying the above said averments, have only stated that there is no provision under Section 220 (1) to consider the history or background of the petitioner before passing that order. No past conduct or likely future conduct governed the passing of the order and that is only the interest of revenue which governs the order.

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20. Though it is a matter of discretion for the Income Tax Officer to fix a time less than 30 days to pay the amount demanded, it is not an uncanalised power or discretion to fix the lesser period than 30 days and if in any particular case the discretion is not exercised in a judicial manner, it is open to the High court to interfere and set aside such orders of the Income Tax Officer passed in abuse of the powers under Section 220(1) of the Act. In this context, it is pertinent to point out

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that even according to the respondents the petitioner has got substantial assets by way of immovable properties including two major industrial units which are worth many the times the demand in question. In the counter affidavit it is stated that the petitioners are admittedly rich enough to meet the demand at any point of time. Had the Income Tax Officer / the first respondent kept the above said material facts in his mind before exercising his discretion under Section 220(1) of the Act, neither he would have reduced 30 days time granted in respect of the assessment year 2001-02 nor fixed 2 days time in respect of the assessment years 2003-04 and 2004-05. The first respondent instead of justifying the grounds based on which he has reached the reason to believe has wrongly cast the burden on the assessee to show as to how the interest of Revenue would not suffer in terms of provisions of Section 220(1) if it is allowed full time for payment.

21. I am satisfied that the so called reasons stated by the first respondent in the impugned proceedings for coming to the conclusion that if the full period of 30 days time is allowed to the petitioner, it will be detrimental to Revenue are not material or relevant to the belief required by the Section. Therefore, I am of the considered view that the impugned proceedings issued by the respondents are unsustainable and liable to be quashed.

22. Accordingly, the impugned proceedings are set-aside. But however, the notice of demand dated 02.03.2006 issued under Section 156 of the Act allowing 30 days time to the petitioner in respect of Assessment Year 2001-02 shall stand. In respect of Assessment Years 2003-04 and 2004-05, the petitioner shall have 30 days time from 03.03.2006 to pay the amounts covered by the respective demands.

23. In the result, the writ petitions are allowed. No order as to costs. Consequently, the connected WPMPs are closed.

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Asst.Registrar

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Sub Asst.Registrar

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1. The Income Tax Officer
   Ward I (1)
   Pondicherry.

2. The Commissioner of Income Tax
   D.P.Thottam, M.G.Road
   Pondichery - 605 003.

3 cc To M/S.Dr.Anitha Sumanth, Advocate, SR14321.
1 cc To M/S.Pushya Sitaraman, Advocate, SR.14654.

Writ Petition No.7464, 7465 and 7472 of 2006
and W.P.M.P.No.8203, 8204 and 8210 of 2006

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